No. 12297.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERMAN HAYMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal, the judgment on appeal herein having been filed October 27, 1950.

I.

Preliminary Statement.

This Court by a two to one vote of a three judge court ordered the judgment reversed and the motion dismissed in the Court below.

Separate concurring opinions, by Chief Judge Denman and by Judge Stephens, together with a dissenting opinion of Judge Pope were filed. Each opinion is grounded upon a different basic premise. The judgment of the Court is thereby rendered indefinite and the law uncertain upon questions of the highest importance in the administration of justice.

This petition for rehearing is made upon the ground that the opinion of the court should be restricted to the

issues raised by this appeal and thereby made definite and certain.

This petition is addressed to questions which were neither briefed nor argued before this Court. They are questions which the Court, very properly, raised, *sua sponte*. They are questions which the Court considered and answered in its opinions. Because the answers are non-uniform in the separate opinions of the Court we take this opportunity of suggesting a common ground and urging uniformity.

We urge that a rehearing be granted and that the Court thereupon order the judgment reversed and the cause remanded for further proceedings in the trial court with the appellant there present.

II.

The Attendance of the Appellant at the Hearing Below Is Available by Writ of Habeas Corpus Ad Testificandum.

The production of a prisoner before the convicting Court from a distant district can be accomplished by writ of *habeas corpus ad testificandum*. Even prior to the enactment of 28 U. S. C. 2255 the courts recognized that the writ was appropriate for this purpose. *Ex parte Bollman*, 4 Cranch 75, 8 U. S. 75, 2 L. Ed. 554; *Gilmore v. United States,* 10 Cir. (1942), 129 F. 2d 199; *Sanders v. Brady,* D. C. Md. (1944), 57 Fed. Supp. 87, 89. See also, *Barrett v. Hunter,* 10 Cir. (1950), 180 F. 2d 510, now on petition to the Supreme Court of the United States for writ of certiorari. Section 2255 does not limit or deny the writ for this purpose.

The attendance of the appellant would remove the objection that procedural due process was denied.

III.

Section 2255 Is Constitutional.

Section 2255 forms an integral part of the revised habeas corpus provisions of the new Judicial Code (28 U. S. C., Secs. 2241-2255). Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, Chairman of the Judicial Conference Committee which drafted the revised habeas corpus provisions, in his article *Limiting the Abuse of Habeas Corpus,* 8 F. R. D. 171-178, describes the genesis and purposes of these revised provisions, including section 2255. He points out that a major purpose of the revised provisions generally, and of section 2255 in particular, was to correct certain flagrant abuses of the writ of habeas corpus by prisoners serving sentences imposed by courts of the United States, without in any way impairing the substantive rights which the writ of habeas corpus, as construed by decisions of this Court, was designed to protect. Thus, in his description of the purpose of section 2255, he points out (8 F. R. D. at 175):

> "Congress has not attempted to take away the right to make collateral attack on convictions obtained in violation of constitutional rights. It has provided, however, that, where conviction was had in the federal courts, this right must be asserted by motion before the sentencing court, and not before another court by application for habeas corpus, *unless it shall appear that the remedy by motion is not adequate.*" (Emphasis supplied.)

And, speaking of the last paragraph of section 2255, *supra*, he observes (*ibid.*):

> "It will be noted that this paragraph requires that the attack upon the judgment of imprisonment be

made in the court where it was rendered, where the facts with regard to the procedure followed are known to the court officials, and where the United States Attorney who prosecuted the case will be at hand to see that these facts are fairly presented. *Only where a judge to whom application is made for habeas corpus finds that the remedy by motion is "inadequate or ineffective to test the legality of the detention" is he authorized to entertain the application."* (Emphasis supplied.)

Judge Parker's conclusions reemphasize the point that no substantive rights of illegally imprisoned persons are affected by the revised provisions in general or section 2255 in particular (8 F. R. D. at 178):

> "* * * There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the ground that they have been denied the sort of trial guaranteed by the Constitution; but effective provision is made against the unseemly incidents which have arisen in the assertion of the right. * * *
>
> It is believed that the effect of these provisions of the Revised Code will be to protect the courts in the administration of criminal justice from the delays, harassments and unseemly conflicts of jurisdiction which have arisen under recent habeas corpus decisions, without in anywise impairing the rights which it was the purpose of those decisions to protect. The habeas corpus procedure which led to abuse was laid down by the Supreme Court out of a desire that complete justice be done in every case. The provisions of the Revised Code preserved everything of importance in that procedure while eliminating the abuses to which it has given birth."

We think that it is thereby made clear that Section 2255 offers no infringement or limitation upon the constitutional privilege respecting the writ of habeas corpus.

In any event the necessities of this case require no consideration of the constitutional question.

We urge, therefore, that the judgment be reversed solely on the ground that a factual issue (*i. e.,* the effective conflict of assistance of counsel) is raised which requires appellant's presence at the hearing below.

IV.

The Grounds of and Reason for Reversal Should Be Clarified.

The Chief Judge in his opinion indicates that in the circumstances obtaining, the appellant was denied due process and, therefore, that the motion under Section 2255 is "inadequate and ineffective to test the legality of his detention."

Judge Stephens in his opinion indicates that "there is lack of due process inherent in the proceeding provided by the section (2255)."

If the opinion of the Chief Judge obtains as the opinion of the Court, then we urge that upon reversal the cause be remanded to the trial court for further hearing with the appellant present so as to afford him due process.

If the opinion of Judge Stephens obtains as the opinion of the Court then we urge that the Court make its grounds of reversal clear, in order that the important determination can be squarely made as to the constitutionality of Section 2255.

Conclusion.

Because the matters involved are of major importance, because they were never briefed or argued before this Court and because clarification is necessary and desirable in the interests of orderly administration of justice, we urge that a rehearing be granted.

The Government proposes, separately and apart from this petition, to make a motion before the Court that this matter be heard and determined *en banc*. (28 U. S. C. 46(c).) We do not herein petition the Court for a hearing *en banc* because this Court has held that such a *petition for rehearing en banc* is without authority in law or in the rules or practices of the Court. (*Kronberg v. Hale,* (9 Cir., 1950), 181 F. 2d 767; *Northwestern Mutual Life Ins. Co. v. Gilbert* (9 Cir., 1950), 182 F. 2d 256.) We do assert, however, that the importance of the matters involved warrant consideration by the full Court.

Respectfully submitted,

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Attorneys for Appellee.

Certificate of Counsel.

I, Robert J. Kelleher, Assistant United States Attorney, one of the attorneys for the Appellee, hereby certify that in my opinion the within petition for rehearing is well founded and that the same is not interposed for delay.

ROBERT J. KELLEHER,
Asst. U. S. Attorney.